'Do You Ever Have One of Those Days When Everything Seems Unconstitutional?': The Italian Constitutional Court Strikes Down the Electoral Law Once Again

Italian Constitutional Court
Judgment of 9 February 2017 No. 35

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INTRODUCTION

There is no peace for electoral legislation in Italy. With its decision no. 35 of 2017, the Italian Constitutional Court (hereafter: 'the Court' or 'the Constitutional Court') struck down significant parts of the electoral law for the Chamber of Deputies, as approved by Parliament in 2015. The transition of the Italian electoral system from a proportional to a majoritarian system of representation has once again been called into question, only a few weeks after a broad proposal for constitutional reform, initiated by the Government and approved by the Parliament, was finally rejected by the electorate with a referendum held on 4 December 2016. In fact, the decision of the Court has a direct precedent in a judgment it issued in 2014[1] that opened the Court up to adjudicating, striking down and substantially re-rewriting the core of electoral law for the first time in its jurisprudence.

This case note consists of three sections. First, it provides a short overview of tumultuous recent developments in the matter of electoral legislation in Italy. Second, it describes the electoral system for the Chamber of Deputies that was

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[1] Corte costituzionale, judgment of 13 January 2014 No. 1.

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introduced by parliamentary majority within the context of a broader project of institutional reform in 2015 and illustrates the Constitutional Court's decision on it. Finally, the case note explores the meaning of this decision from two broader perspectives: first, it reflects on the decision from a comparative angle. Second, and finally, the case note contextualises the decision within the framework of the incomplete process of transition that seemed to lead the Italian political landscape from a proportional representation system to a majoritarian one.

A Tumultuous Background: An Overview of Italian Electoral Legislation

The 1948 Italian Constitution does not directly regulate the electoral system. Constitutional framers left the electoral system 'open-ended'.[2] To make a long story short,[3] a rough chronology of the development of Italian electoral legislation consists of three main timeframes. From 1948 to 1993, national electoral law was based on proportional representation;[4] from 1993 to 2005 electoral legislation consisted of a mixed system that entailed the election of 75% of the members of each chamber by a single-member simple plurality method and the remaining 25% by proportional representation; finally, from 2005 to 2014 electoral legislation was formally based on a proportional representation system, with noteworthy majoritarian corrections.[5]

[2] E. Longo and A. Pin, 'Judicial Review, Election Law, and Proportionality', 6 *Notre Dame Journal of International & Comparative Law* (2016) p. 101 at p. 105. However, the political landscape of the framers was certainly inspired by a proportional representation system. A proportional representation mindset not only emerged in the composition of the Constituent Assembly, but also in several political statements approved by the Constituent Assembly. On 23 September 1947, the Constituent Assembly approved an order containing guidelines (*ordine del giorno*), stating that 'the Constituent Assembly holds that the election of members of the Chamber of Deputies shall be based on a proportional representation system'. A similar act of political direction was previously discussed in the II subcommittee on 8 November 1946.

[3] On these developments, *see further* C. Fusaro, 'Party System Developments and the Electoral Legislation in Italy (1948-2009)', 1 *Bulletin of Italian Politics* (2009) p. 49.

[4] In 1953, the Christian Democratic majority in Parliament transformed the electoral system, making it majoritarian. An electoral list needed to obtain at least 50% of the votes cast to obtain a two-third majority of seats, but the Christian Democratic Party failed to reach that threshold. The act was later repealed by Parliament. On this early attempt to transform the electoral system, *see extensively* G. Quagliariello, La legge elettorale del 1953 [*The Electoral Law of 1953*] (Il Mulino 2003).

[5] The system can be defined as a 'majority-assuring proportional system' (according to the classifications outlined by M. Shugart and M. P. Wattenberg, *Mixed-Member Electoral Systems: The Best of Both Worlds?* (Oxford University Press 2001) p. 598. In this sense, *see* Fusaro, *supra* n. 3, p. 58; A. Baraggia and L.P. Vanoni, 'The Italian Electoral Law Saga: Judicial Activism or Judicial Subsidiarity', *STALS Research Paper* (2017) p. 1 at p. 8.

This law was seemingly based on a formula that would ensure proportionality, but was nonetheless characterised by a very robust mechanism that favoured the stability of the executive by allocating an automatic majority bonus to the coalition with the most votes nationally so that it could occupy 55% of the seats in the lower house. As for the upper house, electoral law was based on a proportional representation system with a majority bonus awarded to the coalition that had a relative majority of votes cast in each regional district. Additionally, the system worked with closed lists, with parties compiling a candidate list for each voting district. Candidates could be elected depending on their position on the list, and voters were unable to cast preferential votes or to influence the order of candidates established by the parties in any way. Since electoral districts were relatively large and the candidate lists very long, the names of the electoral candidates were often barely recognisable to the voters in each district. Moreover, candidates could run in more than one district, and if they were elected in more than one, they could pick and choose which district they would represent after the vote had taken place.

The law was dubbed *Porcellum* ('dirty trick'[6]) in journalistic slang, both because of the quick and politically arrogant approval procedure pushed through at the very end of the legislative term, and because of the many controversial aspects that immediately made it a target of harsh criticism. Of these, the most hotly debated points were: (i) the potential allocation of a majority bonus even though the winning coalition had failed to meet the minimum representative threshold; (ii) the peculiar distribution of majority bonuses, which at the national level were awarded for the Chamber of Deputies and at the regional level for the Senate, with the hazard of ensuing political disparity between the two houses; (iii) the lack of any form of preferential voting, and the composition of very large voting districts where candidates are barely recognisable to the electorate;[7] and (iv) the absence of any limits on multiple candidatures, thus allowing the most visible political leaders to stand in all districts, and only subsequently to opt for the district of election (thus influencing the election of the first 'unelectable' candidate in the 'unchosen' districts).

[6] The non-literal and effective translation is by G. Piccirilli, 'Maintaining a 4 percent electoral threshold for European elections, in order to clarify access to constitutional justice in electoral matters: Italian Constitutional Court judgment of 14 May 2015 no. 110', 12 *EuConst* (2016) p. 164 at p. 168.

[7] On the anachronistic methods of keeping candidates' names (in)accessible to voters, *see* N. Lupo, 'Nell'era della comunicazione digitale, è mai possibile che il nome dei candidati alle elezioni politiche si conosca solo mediante l'affissione del manifesto elettorale?' [*In the Digital Era, is it Ever Possible that the Names of Candidates in General Elections are only Accessible through the Publication of Electoral Posters?*], *Forumcostituzionale*, 30 March 2006, available at <www.eprints.luiss.it/134/1/Lupo_2006_03_OPEN.pdf>, visited 31 July 2017.

Despite extensive criticism, the electoral legislation introduced in 2005 'survived' three general elections. In 2006, the newly-introduced electoral legislation gave rise to a very fragile centre-left political majority. This fragility led to a political crisis and an early dissolution of Parliament. In 2008, the centre-right regained a majority of seats in both houses. In 2013, the electoral law approved in 2005 was applied for the last time, giving rise to an extremely fragmented Parliament. In fact, the structural flaws of the electoral legislation adopted in 2005 were revealed most dramatically after the 2013 general elections: whereas the majority bonus guaranteed a very stable political majority for the centre-left coalition in the Chamber of Deputies, the situation in the Senate was (and remains) exceptionally fragmented.[8]

The 2005 law was not only contested in the parliamentary arena, but also faced political and legal challenges.[9] Repeated attempts were made to repeal the law by popular referendum, which failed either because votes cast did not reach the necessary quorum of 50% of the total electorate, so were not valid, or because the proposal was declared inadmissible by the Constitutional Court on the grounds that the Constitution did not allow a total repeal of Parliamentary electoral law. In brief, the Court held that workable electoral legislation should always exist, and rejected the idea that the total repeal of an electoral law would cause whichever system was previously in effect to automatically be restored. The Court, however, also made use of the proceedings to voice its criticism of the electoral legislation by issuing an obiter dictum, warning political actors of the problematic aspects of unconstitutionality.[10]

As regards judicial review, challenges to the constitutionality of electoral law would traditionally run into roadblocks – in the Italian system of constitutional justice, an *actio popularis* does not grant access to the Constitutional Court, and the incidental method of access to the Court was considered unworkable. In fact, Article 66 of the Constitution provides that Parliament itself has jurisdiction over any potential controversy concerning electoral results. This provision was long held to be an insurmountable obstacle to the judicial review of electoral legislation – it put national elections off-limits to constitutional justice. In fact, Article 66 designated the houses of

[8] On the flaws of this electoral law and their impact on institutional life, *see* Longo and Pin, *supra* n. 2, p. 106. On the detrimental effects of the dysfunctional electoral law on the political landscape after the general elections of 2013, *see* G. Pasquino and M. Valbruzzi, 'Post-Electoral Politics in Italy: Institutional Problems and Political Perspectives', 18 *Journal of Modern Italian Studies* (2013) p. 466; N. Lupo and G. Piccirilli, 'Introduzione. I percorsi delle riforme istituzionali nella XVII legislatura' [*Introduction. The Paths of Institutional Reforms in the XVII Legislature*], in N. Lupo and G. Piccirilli (eds.), Legge elettorale e riforma costituzionale: procedure parlamentari «sotto stress» [*Electoral Law and Constitutional Reform: Parliamentary Procedures under Pressure*] (Il Mulino 2016) p. 14.

[9] For an overview of civil challenges in this matter, *see* Piccirilli, *supra* n. 6, p. 168-169.

[10] Corte costituzionale, judgments of 30 January 2008, Nos. 15 and 16.

Parliament as the sole judge of their own election, thus making it legally impossible to initiate a principal court proceeding in which constitutionality could be raised as a procedural issue. Against this background, in 2009 a group of citizens initiated an unprecedented legal action within the framework of a civil proceeding: they claimed a violation of their right to vote by making a general application for declaratory relief concerning the integrity of the constitutional right to vote. The plaintiffs neither claimed damages nor challenged the outcome of an election, but merely claimed that the integrity of their right to vote had been violated. They thus succeeded in convincing the Court of Cassation to refer a question on the electoral law's constitutionality to the Constitutional Court. However, it was far from certain whether the constitutional question would be deemed admissible.

With its decision No. 1 of 2014, the Constitutional Court – to the surprise of many commentators[11] – abruptly abandoned its reluctance to get involved in matters of electoral legislation: the Court not only declared the constitutional question admissible, but also struck down the electoral system approved in 2005 as partly unconstitutional. The referring court had challenged the provisions of the 2005 legislation, alleging a violation of Article 3 of the Constitution (source of the principles of proportionality and reasonableness) in addition to Article 1(2) (principle of popular sovereignty), Article 67 (principle of national political representation of MEPs), Article 48(2) (one man, one vote principle), Article 56(1) and 58(1) (principle of direct suffrage) of the Constitution. The referring court claimed that the disputed provisions unreasonably caused an objective and serious impairment of democratic representation. To make a long story short, the Constitutional Court focused on two main flaws, declaring unconstitutional those norms that allowed allocation of the majority bonus even when the minimum threshold of votes had not been met, as well as those norms used to compile extremely long and locked candidate lists that made elected candidates essentially unrecognisable to the electorate since they were chosen by the parties and not by the voters. After the Court's decision, the remaining electoral legislation maintained a proportional representation system, with slightly different thresholds for each of the two houses of Parliament: 8% for individual lists and 20% for coalitions standing for the Senate; 4% for individual lists and 10% for coalitions standing for the Chamber of deputies. The majority bonus was simply removed from electoral law, and the previously closed lists were opened up to preferential voting.

A few months after the Court issued judgment No. 1/2014, the President of the Council of Ministers, Enrico Letta, stepped down and a new Government led by Matteo Renzi took office. The new Government immediately launched an

[11] Among many others, a prominent former President of the Court noted that in times past such a judgment would have been 'unconceivable': *see* G. Zagrebelsky, 'La sentenza n. 1 del 2014 e i suoi commentatori' [*Judgment no. 1 of 2014 and its commentators*], 58 *Giurisprudenza costituzionale* (2014) p. 2259 at p. 2959.

ambitious program of institutional reforms which consisted of both overarching constitutional and electoral reform. Regarding constitutional reform, the Government introduced a Bill aimed at overturning the symmetrical bicameral system; only the lower house would have held a confidence relationship with the Government, while the upper house would instead be turned into an indirectly elected Chamber that reflected territorial regional and local autonomies. Regarding electoral reform, the Government proposed a new electoral law (nicknamed *Italicum*),[12] which was approved by Parliament making use of a method for tackling opposition filibusters in electoral matters that was used only once in 1953: the matter was put to a vote of confidence.[13]

The new electoral law would apply to the lower house only, given that the constitutional reform aimed to turn the upper house into an indirectly elected body. The application of electoral reform solely to the lower house tightly intertwined constitutional and electoral reforms. This 'original sin'[14] of the *Italicum* was further amplified by the outcome of the December 2016 referendum on constitutional reform. The majority of those who voted in the referendum rejected the proposal, and were therefore in favour of keeping symmetrical bicameralism. The overall picture was to become even more complicated by the end of 2016: the constitutional architecture maintained its symmetrical bicameral system, and both houses held a confidence relationship with the Government. Nonetheless, only in the lower house the *Italicum* was designed to guarantee a single-list majority. In the upper house, the electoral law in force remained the electoral law that survived the Constitutional Court's decision No. 1/2014, a proportional representation system that gave no guarantee of a majority with the same political persuasion as the one created in the lower house by the *Italicum*. In short, the *Italicum* was approved on the premise that the constitutional reform would be approved, but this assumption proved ill-fated.[15]

[12] The nickname followed the journalistic habit of nicknaming electoral laws by Latinising the name of the main political proponent of the law (this is the case for *Mattarellum*), or one of its essential features (this is the case for *Porcellum* as illustrated above). The nickname *Italicum* emphasised the peculiar character of a mixed form of government (proportional in its formula and majoritarian in its effects) that was held as an 'Italian model of government': R. D'Alimonte, 'La formazione elettorale dei governi' [*The Electoral Formation of Governments*], *Il Filangieri* (2010) p. 56.

[13] For further details on these procedural anomalies, *see* E. Gianfrancesco, 'Il logoramento del diritto parlamentare nell'approvazione della legge n. 52 del 2015 in un periodo di "grandi riforme"' [*The Decay of Parliamentary Law in the Approval of Law No. 52/2015 in Times of Major Reforms*], in N. Lupo and G. Piccirilli (eds.), *supra* n. 8, p. 133.

[14] A. Baraggia, 'Italian Electoral Law: A Story of an Impossible Transition?', 16 *Election Law Journal* (2017) p. 272 at p. 273.

[15] On the connection between the electoral and constitutional reforms, *see further* E. Stradella, 'Italy after the Constitutional Referendum: Legal and Political Scenarios, from the Public Debate to the "Electoral Question"', 61 *Italian Law Journal* (2017) p. 61 at p. 65-66.

Law 52/2015 ('*Italicum*') and the Court's Decision

The *Italicum* envisaged an electoral system based on a proportional formula significantly stabilised through the assignment of a 'majority bonus' which topped up the most voted-for party to 340 out of 630 seats in the Chamber of Deputies. As opposed to the electoral system declared unconstitutional in 2014 that referred to coalitions in addition to lists, a 55% majority was awarded to the list that won with a majority of at least 40% of votes at the first round of voting, or failing that, the list that won a run-off to be held between the two most voted-for lists from the first round.

The system for allocating seats differed from previous electoral legislation. In the *Italicum* system, lists were presented in 100 multi-member constituencies of reduced dimensions (three to nine deputies would have been elected in each constituency), which would have led to lists with a rather limited number of candidates, whereas in the previous system constituencies were of very extended dimensions, leading to very long lists of candidates; in each constituency, only one candidate was a fixed candidate: his or her name appeared at the top of the list on the election ballot, facilitating voters' knowledge of him or her in advance; as for the other candidates, voters might express up to two preferences (provided that one was a man and one a woman) from among the candidates who did not head a list.

Shortly after the approval of the *Italicum*, five different judges accepted plaintiffs' motions to make a referral order to the Constitutional Court, challenging the constitutionality of the *Italicum*. Once again, the admissibility issue was harshly disputed. Plaintiffs counted on the precedent of judgment No. 1/2014, although that decision had been harshly criticised. The Court now had an occasion to take leave of the perilous ground it trod upon in 2014. Moreover, unlike the electoral law declared unconstitutional in 2014, the *Italicum* had never been applied. In the view of many commentators,[16] this provided good reason for the Constitutional Court to move away from the merits of the decision, without overruling its recent precedent. Nevertheless, on this point the Constitutional Court decision in *Italicum* held firm to its 2014 precedent. The Court maintained that the action for declaratory relief was not impeded by the fact that the disputed electoral legislation had never been applied by the time the action was brought before the Court. Plaintiffs in the principal proceedings were free to bring action against any potential future violation of the integrity of the right to vote.

[16] In this sense, *see* R. Bin, 'Chi è responsabile delle "zone franche"? Note sulle leggi elettorali davanti alla Corte' [*Who is Reponsible for 'Free Zones'? Remarks on electoral laws before the Court*], *Forumcostituzionale*, 9 June 2017, available at <www.forumcostituzionale.it/wordpress/wp-content/uploads/2017/01/nota_35_2017_bin.pdf>, visited 26 July 2017.

As to the merits, challenges to the *Italicum* were essentially confined to two main points: the method of assigning the majority bonus, and the regulatory scheme permitting top list candidates to run in up to ten constituencies, as well as – in the case of a candidate's election to more than one constituency – the related obligation to declare which of the constituencies he or she has chosen only after the election (within eight days of the date of the last results).

As to the first issue – the constitutionality of the majority bonus – the Court upheld the provisions concerning the constitutionality of a majority bonus for the list that receives 40% of the votes cast in the first ballot, but it struck down the provisions concerning the run-off voting mechanism. As for the first method of assignment of the majority bonus, the referring judges acknowledged that the minimum threshold necessary to obtain the bonus in the first round (40%) did not give rise to constitutional objections *in principle*. However, in the view of some of the referring courts, *in concreto* the system for assigning the majority bonus may give rise to the risk of excessively distorting the vote's outcome in favour of the winning list in the first round. The referring judges argued that the bonus was based on the number of valid votes cast and bore no relation to the entire population of potential voters. The Court rejected this argument, affirming that in this matter broad discretion should be granted to the legislature. The Court found that the 40% threshold is not manifestly unreasonable, since it is intended to balance the constitutional principles of the representative nature of the Chamber of Deputies and the equality of votes, on the one hand, with the constitutionally significant objectives of the stability of Government and the efficiency of the decision-making process, on the other.[17] Nonetheless, the Court raised some concerns, observing that in times characterised by dramatic abstention from the vote, the majority bonus system could favour a list that only weakly represents the potential electorate. However, the Court conceded that it was up to the legislature to decide whether the bonus was to be awarded on the basis of the percentage of the votes validly cast or on a percentage of the electorate.[18]

The Court struck down the run-off mechanism as unconstitutional on the basis of the argument that the run-off round was not a new vote, but rather 'the continuation of the first round of voting'.[19] In the Court's view, this argument was supported by the regulation, in concrete terms, of the run-off round: only the two lists that received the most votes in the first round had access to the second; no coalitions or alliances among lists could be struck between the two rounds; and the allocation of seats remained the same after the second round of voting for all except

[17] Corte costituzionale, judgment of 9 February 2017 No. 35, Conclusions on point of law, para. 6.

[18] Ibid.

[19] Ibid., para. 9.2.

the winning list. Therefore, in the Court's view the run-off was 'nothing more than a continuation of the first round of voting'[20] and the constitutional requirement enshrined in the Court's recent case law (judgment No. 1/2014) applied: the majority bonus assigned through the run-off round of voting is subject to the limitations imposed by the constitutional requirement that the representative nature of the elected assembly and the equality of the vote not be excessively compromised.

In the Court's view, the run-off rule excessively compromised the aforementioned constitutional requirements. It is not the run-off round of voting among lists, considered in the abstract, that is in and of itself unconstitutional.[21] Rather, it is the regulation, in concrete terms, of the run-off round for the election of the Chamber of Deputies that generates a distorting effect similar to the one identified by the Court with regard to the previous electoral legislation. The point is that a given list might have access to the second round of voting even having obtained only a relatively slim number of votes in the first round, and may, irrespective of this fact, attain the bonus and receive a more substantial number of additional seats than it would have obtained on the basis of the votes it won in the first round. This mechanism provided a robust majoritarian injection into an electoral system that was based on a proportional formula. It aimed at creating (and not merely favouring) a governing political majority within the Chamber of Deputies. The Court found this mechanism to be in violation of Article 48(2) of the Constitution, which establishes the principle of one person, one vote and the principle of the representative nature of the elected assembly in a parliamentary form of Government. In the Court's view, stability and speedy decision-making lead to an excessive sacrifice of the constitutional principles of the equality of the vote and the representative nature of elected assemblies in parliamentary systems. Therefore, the Court struck down the run-off round of voting as a whole. However, the Court – as a purely negative legislator – could not repair the run-off by adding new conditions to the concrete methods by

[20] Ibid.

[21] The Court added that the judgment of unconstitutionality of the provisions under review has no bearing on the system of second-round voting in place in large cities, which has already passed constitutional scrutiny. *See* 175 of 2014 and the related comment by R. Bifulco, 'Brevissime considerazioni sul rapporto tra la sentenza della Corte costituzionale 1/2014 e le legislazioni elettorali regionali' [*Brief Considerations on the relationship between the Constitutional Court's Judgment 1/2014 and Regional Electoral Laws*], 1 *Nomos* (2013) p. 1; A-O. Cozzi, 'Gli effetti della sentenza n. 1 del 2014 sui premi di maggioranza regionali' [*The Judgment 1/2014 Effects on Regional Majority Bonuses*], 59 *Giurisprudenza Costituzionale* (2014) p. 4167; G. Perniciaro, 'I premi di maggioranza previsti dalle leggi elettorali regionali alla luce della sentenza n. 1 del 2014 della Corte costituzionale' [*Majority Bonuses in Regional Electoral Legislation in Light of the Constitutional Court's Judgment 1/2014*], in Scritti *in onore di Antonio d'Atena* [*Festschrift in Honour of Antonio d'Atena*], vol. 3 (Giuffrè 2015) p. 2399.

which the bonus is assigned, or by inserting any or all of the corrective mechanisms, whose absence was decried by the referring judges. In the Court's view, this task falls under the broad discretion of the legislature, the place of which cannot be taken by constitutional judges, out of unyielding respect for their own limited role. The Court's role in this field is limited to adjudicating those cases where the regulatory scheme is 'manifestly unreasonable'.[22]

As for the complaint about the possibility of parallel multi-candidacy of the same candidate, followed by selection of the constituency in which to be elected, the Court struck down part of the legislation. In the referring judges' view, the possibility of selecting a constituency for the election only after the vote has taken place fosters opportunistic calculations that make the choice of the elected candidate neither predictable in advance nor subject to any predetermined criterion. According to the referring judges, this system would thus violate Articles 3 and 48 of the Constitution, inasmuch as the decision of candidates elected in more than one constituency would arbitrarily affect the election of other non-fixed candidates. In fact, only the first non-elected candidates of constituencies unseated by the winning candidate at the top of a candidate list would be elected.

The Constitutional Court accepted the referring courts' claim on this point. In the Court's view, the power of candidates at the top of a candidate list elected in more than one constituency to choose in which constituency to be elected, affects not only their own election, but indirectly wields the improper power to designate the representative of other involved constituencies. In brief, the arbitrary decision taken by the candidate at the top of a candidate list may affect the impact of any preferential votes cast by the electorate. This distortive effect violates the principle of equality and the personal nature of the vote, respectively enshrined in Article 3 and Article 48(2) of the Italian Constitution. Therefore, the Court declared unconstitutional those parts of the electoral legislation that allow for this arbitrary choice of candidates elected in multiple constituencies.

However, the Constitutional Court was fully aware of the fact that any declaration of unconstitutionality in electoral matters needed to ensure that the legislation surviving the Court's decision was workable and 'self-executing'.[23] In fact, according to long-established constitutional jurisprudence originating from

[22] Corte costituzionale, judgment of 9 February 2017 No. 35, Conclusions on point of law, para. 6.

[23] This requirement was developed by the Court in the field of decisions on the admissibility of referendums, where the Court stated that laws 'needed for the correct working of constitutional bodies' are outside the scope of referendums. In these fields, only partially abrogative referendums are admissible, as long as the abrogation coming from the referendum does not leave the country without any workable electoral law: *see* V. Barsotti *et al.*, *Italian Constitutional Justice in Global Context* (Oxford University Press 2016) p. 51.

the Court's case law on the admissibility of referendums on electoral laws and later, since 2014, transposed into the field of constitutionality review,[24] the electoral regulatory scheme surviving a declaration of unconstitutionality has to be applicable immediately after the Court's judgment, without requiring any legislative restoration.[25] Therefore, after noting that there is more than one possible alternative criterion that could provide a legitimate substitution for the provisions declared unconstitutional, the Court recalls the limits of its powers: any choice between alternative criteria would amount to a violation of these limits, as the choice belongs to the legislature. Nonetheless, the Court could strike down the contested provision referring to a residual measure provided by the electoral legislation in force: the measure of drawing lots. After the annulment of the contested provisions to the extent that they provide that a candidate elected in more than one constituency can arbitrarily declare the constituency of his or her election, a residual measure provided in the electoral legislation applies: lots could be drawn to decide in which constituency the candidate would be considered chosen. This option already existed as a residual measure in the disputed electoral legislation – for the eventuality that a candidate elected in more than one constituency fails to opt for one within eight days – and was therefore not invented *ex novo* by the Constitutional Court.

The Broader Picture

The *Italicum* decision is not only important in and of itself; it also offers many points to consider from a comparative angle. These operate from the premise that any comparative analysis in the field of electoral legislation should be exercised with caution. Electoral law is affected by local variables more than any other field of law: the constitutional framework, the party system, and the political attitude of citizens are only some of the many elements that strongly affect electoral legislation in a given legal system. This is truer still for any comparative considerations concerning the justiciability of electoral legislation. In this field, a further layer of variables should be added: the centralised/decentralised model of judicial review; the position of the Constitutional Court in the legal system; the system of access to the Constitutional Court; the powers of the Court and the effects of its decision are some of the key elements that may characterise the exercise of constitutional review of electoral legislation in a very peculiar and hardly comparable manner.

[24] In this sense, *see* Corte costituzionale 1/2014, and in regard to the admissibility of referendums on electoral laws, *see* 13/2012, 16 and 15/2008.

[25] This implies that the Constitutional Court will not declare a rule unconstitutional if the result is that the remaining electoral rules do not give a workable electoral system.

However, the *Italicum* decision reveals a trend of growing judicial activism in the field of electoral legislation that is not unfamiliar to other jurisdictions. The Italian Constitutional Court expressly considered the case law of the German Constitutional Court in its 2014 decision, as the *Bundesverfassungsgericht* operates 'within a constitutional system that is similar to the Italian one',[26] where the proportional representation principle is also incorporated, whilst the specific form of the electoral system is not afforded constitutional status. In Germany, many decisions were issued in the field of electoral legislation at multiple levels (local,[27] State,[28] federal[29] and European[30]), and an analysis – far too detailed to include here – of the terms of comparability of that jurisprudence with the recent trend undertaken by the Italian Constitutional Court would be necessary. The most striking point is that both the Italian Constitutional Court and the *Bundesverfassungsgericht* had to address one of the core dilemmas facing representative democracies: the tension between the principle of equality of votes on the one hand, and the need to ensure governability on the other.

The common denominator of the case law of the Italian and German Constitutional Courts consists of a growing activism in safeguarding that the balancing enacted by the legislator is not unreasonable. The level of scrutiny and the outcome of the test exercised by the two Courts may vary. Nonetheless, both Courts held that the principle of proportional representation may not be fully sacrificed in favour of governability. Additionally, the *Bundesverfassungsgericht* affirmed that if the legislator adopts a proportional system, even only partially, this decision creates a legitimate expectation on the part of the electorate that there will not be any imbalance in the effects of each vote. In other words, the German Court held that if the electoral legislation is based on a proportional system, a general principle of equality of the 'weight' of each vote 'on the outcome' should be respected when allocating seats, except insofar as necessary in order to avoid impairing the proper operation of the parliamentary body.[31]

A last point worthy of attention is the impact that the decision could have on future decisions by political actors in the electoral field. An attempt to identify the

[26] Corte costituzionale, judgment of 13 January 2014 No. 1, para. 3.1, conclusions on point of law.

[27] BVerfGE, 13 February 2008, 2 BvK 1/07.

[28] BVerfGE, 22 October 1951, 1, 208.

[29] BVerfGE, 28 September 1990, 82, 322; BVerfGE, 3 July 2008, 2 BvC 1/07; BVerfGE 25 July 2012, 2 BvF 3/11

[30] BVerfGE, 26 February 2014, 2 BvE 2, 5-10, 12/13, 2 BvR 2220, 2221, 2238/13; BVerfGE, 9 November 2011, 2 BvC 4/10 (overruling BVerfGE, 22 May 1979). On the decisions of 2011 and 2014, *see*B. Michel, 'Thresholds for the European Parliament Elections in Germany Declared Unconstitutional Twice', 12 *EuConst* (2016) p. 133-147.

[31] *See* German Federal Constitutional Court, BVerfGE 25 July 2012, 2 BvF 3/11.

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most plausible political scenario in the field of Italian electoral legislation would certainly take us beyond the scope of this case note. Nonetheless, the Court's decision draws some guidelines for the future.[32] Many scholars have emphasised the connection between the Court's position and the failure of the constitutional referendum, and assumed that the Court would have come to a different decision if the constitutional referendum had proved successful. This seems far-fetched: on the contrary, the flaws identified by the Court would have been further exacerbated by the constitutional reform. In fact, in its *Italicum* decision, the Court contextualised the electoral law within the parliamentary form of Government designed by the Constitution. The Court noted that 'the application of a system with a decisive run-off round of list-based voting should necessarily take into account the specific function and constitutional position' of the Chamber of Deputies, as 'a fundamental organ in the democratic framework of the entire system, considering that, in a parliamentary form of Government, every electoral system, even if it must foster the formation of a stable Government, can only be primarily geared toward assuring the constitutional value of representativeness.'[33] The Court's concerns about safeguarding the constitutional value of fair representation would have been further reinvigorated in a system, such as the one designed by the constitutional reform, where it would be only the Chamber of Deputies that needed to maintain confidence in the Government and only that Chamber that exercised the main political and legislative functions, leaving only a subsidiary role for the Senate.

At another level, however, a link with the negative outcome of the constitutional referendum was emphasised in a final obiter dictum, that took centre stage in the political debate following the judgment of the Court. In fact, the Court affirmed that in light of the outcome of the referendum, 'the Constitution does not oblige the legislature to introduce identical electoral systems'[34] for the two houses of Parliament. Nonetheless, the Constitution requires that the system adopted does 'not impede, upon the outcome of elections, the formation of homogeneous parliamentary majorities'.[35] Even though the meaning of this obiter dictum is extremely ambiguous, it seems to recommend some degree of homogeneity of the electoral laws for the two houses.

However that may be, with its *Italicum* decision, the Court explicitly made clear that a majority bonus allocated at the national level is not per se

[32] This assumption was partly triggered by the decision of the Constitutional Court to delay the date of its decision, initially scheduled before 4 December 2016, and finally re-scheduled in January 2017.

[33] Corte costituzionale, Judgment of 9 February 2017 No. 35, Conclusions on point of law, para. 9.2.

[34] Ivi, para. 15.2.

[35] Ibid.

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unconstitutional. In fact, the arguments regarding the constitutionality of allocating the bonus directly after the first round of voting (40% rule) were rejected by the Court. Moreover, the Court did not declare allocation of the majority bonus after a run-off round of voting unconstitutional per se. On the contrary, the Court left a wide margin for political discussion, referring to legitimate 'corrective mechanisms'[36] in the assignment of the bonus upon the second round of voting that only the legislature may enact. The recognition of Parliament's broad political discretion recurs almost constantly in the Court's reasoning. Unlike in 2014, in this decision the Court almost obsessively recognises that 'the legislature has broad discretion in choosing the electoral system that it considers to be best suited to the historical-political context in which that system is intended to operate', and thus limits 'its possibility for intervention to those cases in which the established regulatory scheme is manifestly unreasonable'.[37] Additionally, the Court recognises the central role played by political parties in the selection and presentation of candidacies. This role is 'the expression of the position assigned to the political parties by Article 49 of the Constitution',[38] and its recognition is highly significant in times of political and legal populism.

Whereas the Court's decision in 2014 could be thought of as an expression not only of judicial activism, but also of strong distrust for political actors, the *Italicum* decision assigns a crucial role to political parties. This remarkable difference emerges from the comparison between the 2014 and 2017 judgments and is in line with the cautious approach that the Court adopted before its landmark decision in 2014. In fact, the Court decided to drop its reluctance to step into the core of electoral legislation only in 2014, after a long period of political inertia. As mentioned above, the Court's decision in 2014 was preceded by multiple warnings[39] and issued within a political context where the electoral legislation in force was met by extensive criticism in the public arena. Nonetheless, political actors at that time seemed to be trapped in the Weimar Dilemma of the 1930s, described by Ernst Fraenkel: if the Parliament in power was capable of realising reform, the reform realised would be useless; in fact, the incapacity of Parliament to realise such a reform confirms the absolute necessity of its realisation.[40] In this scenario, the Court's 2014 decision would appear to have provided a judicial remedy for political inertia: a gesture of judicial activism aimed at resetting the

[36] Ibid.

[37] Ibid., para. 6.

[38] Corte costituzionale, Judgment of 9 February 2017 No. 35, Conclusions on point of law, para. 11.2.

[39] *See* Corte costituzionale, Judgments of 30 January 2008, Nos. 15 and 16.

[40] Cf. E. Fraenkel, 'Verfassungsreform und Sozialdemokratie', in E. Fraenkel, *Zur Soziologie der Klassenjustiz, und Aufsätze zur Verfassungskrise 1931-32* (Wissenschaftliche Buchgesellschaft 1968) p. 89 at p. 102.

institutional system. The Court's decision forced the legislature to take action, since the regulatory scheme surviving the Court's 2014 judgment was considered by most political actors to be incapable of facilitating stability.

After 2014, the political debate took a new course when the political players initiated comprehensive institutional reform – including the electoral reform that led to the adoption of the *Italicum*. This reinvigoration of the field of electoral legislation, however, did not make the Italian Constitutional Court abandon its new route of judicial activism in electoral matters altogether. Its decision no. 35 of 2017 reaffirms not only that the legislature has broad discretion in electoral matters, but also reaffirms the limitations to the legislature's range of discretion. The Court did not itself draw a clear red line in electoral matters; it left the primary decision up to the democratic and political process. In short, both proportional representation and a majoritarian system seem to be compatible with the Court's understanding of the constitutional requirements pertaining to electoral matters, and the choice is primarily left to political actors, as long as reasonable balancing of the (potentially conflicting) principles of fair representation and governability can be guaranteed.

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